

THE *Dan Smoot Report*



DAN SMOOT

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CRONYISM AND THE COURT

On June 13, 1968, Chief Justice Earl Warren wrote President Johnson saying he intends to retire when a new Chief Justice is qualified. The President revealed this fact on June 26, announcing that he had nominated Associate Justice Abe Fortas to replace Warren as Chief Justice. He nominated Homer Thornberry to replace Fortas as Associate Justice.⁽¹⁾

The Senate Judiciary Committee opened hearings on July 11, 1968. On July 12, Senator Robert P. Griffin (Michigan Republican), who had taken the lead in criticizing Johnson's appointments of Fortas and Thornberry, said:

"Never before has there been such obvious political maneuvering to create a vacancy so that a 'lame duck' President can fill it and thereby deny the opportunity to a new President about to be elected by the people. . . . And never before in history has any President been so bold as to subject himself to the charge of 'cronyism' with respect to two such nominations at the same time."⁽²⁾

Senator Griffin also said Fortas had violated the "separation of powers" principle by continuing, after he became a Court Justice, to take an active role as presidential adviser in policy-making decisions.

Eighteen other Republican Senators joined Griffin in denouncing Johnson's appointment of Abe Fortas, and 5 Democrat Senators publicly revealed that they will oppose confirmation. Richard M. Nixon (who once called Earl Warren "the great Republican Chief Justice") castigated the appointments of Fortas and Thornberry as an attempt by Johnson to take away the rights of the next President.⁽³⁾

Senator Everett M. Dirksen (Illinois Republican) supports the nominations of Fortas and Thornberry. Dirksen dismisses the charge of "cronyism" by quipping that cronies are friends, and that no one should expect the President to appoint strangers or enemies to important offices.

But Thornberry and Fortas are more than mere friends of Johnson. They are so close to the President that their appointments are as improper as if the President had nominated 2 members of his own family.

Thornberry and Johnson have been intimates since boyhood. Thornberry succeeded Johnson in 1948 as Representative from the 10th Congressional District of Texas. He served until 1963 when President

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Kennedy appointed him a federal district judge. He had been one of the most consistent congressional supporters of Kennedy's new-frontier programs — his chief service to the Kennedy administration having been his votes in 1961 and 1963 to pack the House Rules Committee with Kennedy-approved liberals. In 1965, Johnson appointed Thornberry to the 5th Circuit Court of Appeals.

Throughout his 14-year tenure in the House, Thornberry consistently adhered to the Johnson political line, and has remained faithful to it as a federal judge.⁽¹⁾

For almost a generation, Abe Fortas has been one of the most notorious influence peddlers, White House insiders, political fixers, and wire pullers ever to adorn the Washington scene. He entered government service during the early days of Franklin Roosevelt's new deal, at about the time Lyndon Johnson was first elected to Congress.

Fortas worked in the Department of Agriculture, was an Undersecretary of the Department of Interior, and had powerful connections in other important executive departments. When he left government service, he joined other former federal officials in a law firm which specialized in representing companies and individuals doing business with the government. As early as 1949, a Senate investigating panel listed Abe Fortas as one of an elite group of Washington lawyers who were collecting "fat legal fees" as "influence men" with government agencies where they had special contacts.⁽⁴⁾

A recent case, illustrating the effectiveness of Abe Fortas as a Washington fixer, involved one William Hamling. In February, 1965, Hamling was being interviewed by FBI agents in connection with the interstate transportation of obscene material. Hamling's company had published and distributed a paperback book, *Sin Whisper*. Hamling told the FBI men he could beat them anywhere in the United States because he had hired the best lawyers, including Abe Fortas, a Washington attorney who could fix anything, no matter who was

in power. Hamling boasted that he had paid Abe Fortas \$11,000 to get a mailing permit for the girlie magazine, *Rogue*. In December, 1966, the Georgia Supreme Court, affirming a lower court conviction against Hamling's company for distributing *Sin Whisper*, said of the book: "*Sin Whisper* is composed substantially of lengthy, detailed, and vivid accounts of preparation for the acts of normal and abnormal sexual relations. . . . The book . . . is obscene . . . filthy and disgusting." Hamling appealed to the U.S. Supreme Court which reversed the lower courts. Abe Fortas was in the Supreme Court majority which reversed the obscenity conviction against his former client.⁽⁴⁾

Abe Fortas' most significant wire pulling has been effected in behalf of his old friend and client Lyndon B. Johnson.

In 1948, when Johnson won his first primary election for the Senate by a margin of 87 votes, his opponent charged serious irregularities in the counting of votes, especially in Duval County where ballots in anti-Johnson precincts had been destroyed. It seemed evident that Johnson had lost the election by at least 200 votes, rather than won it by 87 votes. A federal district judge ordered the Democrat Party not to put Johnson's name on the ballot for the November general election, and a federal court of appeals upheld the order. In desperation, Johnson turned to Abe Fortas in Washington. The Supreme Court was not in session at the time; but Fortas contrived to get one Supreme Court Justice — Hugo Black — to override the district court and the circuit court:⁽⁴⁾ and Johnson went to the Senate.

On November 22, 1963, Chief Justice Earl Warren blamed the assassination of President Kennedy on "bigots," clearly meaning Dallas conservatives,⁽⁶⁾ though it was known, when Warren made the statement, that the President had been murdered by a communist. On November 26, *The Worker* (communist newspaper) blamed the assassination on the "ultra-right," and recommended that President Johnson appoint a special commission, under Chief Justice Earl Warren, to conduct an investigation. Johnson turned to Abe Fortas for

advice — and, on November 29, appointed the Warren Commission. The real work of the Commission was delegated to a staff — two of whose principal members had known associations with communists: one being a member of a notorious communist front, the other having served as legal counsel for identified communists.⁽⁶⁾

Abe Fortas was the chief architect of the Warren Commission.⁽⁴⁾

In October, 1964, on the eve of the presidential election, Washington newspapers discovered that Walter Jenkins (old friend and chief aide of President Johnson) had been arrested in Washington (recently and on previous occasions) for sexual perversion, and quietly released on forfeiture of bond. When Jenkins learned that he had been found out, he rushed to Abe Fortas — who persuaded the Washington papers to suppress the story. By the time the wire services discovered the scandal, Fortas had Jenkins in a hospital and had obtained from him a resignation as White House assistant.⁽⁷⁾ Instead of being held accountable for a prolonged, intimate relationship with Jenkins, Johnson was thus cast in the light of a kindly man, who, though grieving over the “illness” of a friend, promptly removed that friend from office when his weakness was discovered.

While working for the government, Lyndon Johnson acquired a vast fortune. Much of that fortune resulted from investments in broadcast stations. The phenomenal success of those investments resulted, in large part, from favoritism shown Johnson by the Federal Communications Commission (FCC). All of this having been widely publicized, Johnson, after becoming President, was keenly aware that it did not look good for a President, who has the power to appoint FCC members, to own broadcast facilities dependent for their continued success on FCC good will. He turned to Abe Fortas. Fortas created a trust to run Johnson's financial empire while he is President. President Johnson was thus insulated against criticism about “conflict of interest,” without really divesting himself of the financial interests that could conflict with his duties as President.⁽⁴⁾

In 1965, Johnson nominated Fortas Associate Justice of the Supreme Court. Fortas' reputation as an influence peddler and fixer for Johnson was well known. It was also known that, throughout his adult life, Fortas had associated with individuals and organizations closely connected with the communist conspiracy. At one time, he was an associate of Alger Hiss and a close friend of Harry Dexter White — both communist spies in important government jobs.⁽⁴⁾

Yet, only 3 U. S. Senators opposed the nomination in 1965: John Williams of Delaware, Carl Curtis of Nebraska, Strom Thurmond of South Carolina — all Republicans.

Williams said Fortas was not qualified. Curtis said Fortas' actions in the Walter Jenkins affair had revealed: (1) that Fortas was not firm on the question of law and order, because he regarded law-breakers tenderly as unfortunate people rather than as offenders against society; and (2) that Fortas was more interested in covering up a scandal for a friend and client than in protecting the security interests of the United States.⁽⁷⁾

Senator Thurmond cited Fortas' endorsement, in 1946, of a speech made by G. Brock Chisholm (Canadian psychiatrist, advocate of an all-powerful world government) who urged that children be freed of old-fashioned Biblical notions of sin and good and evil — that they be taught to reject the idea that there are acceptable moral codes by which their behavior can be judged good or bad. Chisholm argued that parents not be permitted to teach their religious faiths and other “superstitions” and “prejudices” to their children. He said psychiatrists should take the lead in teaching youth to put aside the ways of their elders, saying this should be done gently, but that, “if it cannot be done gently, it may have to be done roughly, or even violently.”

Senator Thurmond said that Fortas' wholehearted endorsement of such ideas revealed him as a relativist who accepts no absolute standards and who could not, therefore, be expected to have “respect for the rule of law.”⁽⁷⁾

Brushing aside the objections of Senators Williams, Curtis, and Thurmond — and ignoring Fortas' personal record — the Senate, on August 11, 1965, approved, by *voice vote*, the appointment of Abe Fortas.

Senators who supported Fortas' appointment as Associate Justice in 1965 are denouncing Johnson's attempt to make him Chief Justice in 1968. Why? *Politics* is the plausible answer. In 1965, Johnson was referring to the whole Congress as "my Congress" and was treating it as a subordinate body assembled for the sole purpose of providing what the President demanded. Congress was playing the subordinate role supinely, apparently afraid to offer serious opposition to any presidential proposal.

But by mid-1968, the lustre was gone. Johnson had lost his popularity. Opposing him now could be good politics, whereas it would have been bad politics in 1965. Moreover, since he is an outgoing President with only a few months to serve, Johnson no longer has unlimited power to blackmail members of Congress with tax money — promising more federal spending in the states and districts of those who support him, threatening reductions that would politically damage those who oppose him.

As the 1968 political controversy over Johnson's appointments of Homer Thornberry and Abe Fortas heated up, Thornberry was almost forgotten; and the original charge of "cronyism" and "lame duck appointment" with regard to Abe Fortas became far less significant than the consideration of what it means to have a man like Fortas on the Supreme Court.

Senate action on the confirmation of Fortas and Thornberry having been delayed until after Labor Day, there now appears to be a good chance that the Senate will not confirm them at all.

That will be a great blessing for the country. It will keep Thornberry off the Court, and it will keep Fortas from becoming Chief Justice.

But Abe Fortas will still be an Associate Justice, for the rest of his life if he chooses. What can be done about that? What is the significance of a man like Abe Fortas on the highest court in the land?

We shall look into these matters later. Meanwhile, U.S. Senators should hear from every voter who feels that Johnson's nominations of Abe Fortas and Homer Thornberry should be rejected.

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FOOTNOTES

- (1) *Congressional Quarterly Weekly Report*, June 28, 1968, pp. 1596, 1635, 1636
- (2) *Congressional Quarterly Weekly Report*, July 19, 1968, p. 1834
- (3) Remarks of Senator Ernest F. Hollings, *Congressional Record* (daily), July 18, 1968, p. S 8854
- (4) Extension of Remarks of Representative John R. Rarick, *Congressional Record* (daily), July 22, 1968, pp. E 6759-E 6762, E 6766-E 6771
- (5) *The Dallas Morning News*, Nov. 23, 1963.
- (6) *Congressional Record* (daily), May 5, 1964, pp. 9715 ff.; May 11, 1964, pp. 10163 ff.; and *Communist Activities in the Chicago Illinois Area*, Part 1 of Hearings, U. S. House Committee on Un-American Activities, May 25-7 and June 22, 1965, pp. 319-21, 337, 549 ff.
- (7) *Congressional Record* (daily), August 11, 1965, pp. 19310 ff.

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